**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the | ) | CC Docket No. 96-115 |
| Telecommunications Act of 1996 | ) | |
| | ) | |
| Telecommunications Carriers' Use | ) | |
| Of Customer Proprietary Network | ) | |
| Information and Other Customer | ) | |
| Information; | ) | |
| | ) | |
| Implementation of the Non-Accounting | ) | |
| Safeguards of Sections 271 and 272 | ) | CC Docket No. 96-149 |
| Of the Communications Act | ) | |
| Of 1934, As Amended | ) | |

# REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits reply comments on the Commission's further rulemaking proposal regarding the use and disclosure of customer proprietary network information ("CPNI").[1] In their comments, proponents of the invalidated opt-in approach fail to show that notice and opt-out provides consumers with anything less than full privacy protection, and they also do not explain how a revived opt-in mechanism can survive constitutional scrutiny. The Commission should follow the course favored by the vast majority of commenters in this proceeding and adopt a policy of notice and opt-out in this proceeding.

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[1] Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, *Clarification Order and Second Further Notice of Proposed Rulemaking,* CC Docket Nos. 96-115 and 96-149 (rel. Sept. 7, 2001) ("*FNPRM*").

## DISCUSSION

### I. THE COMMISSION SHOULD REJECT ARGUMENTS ADVOCATING OPT-IN

The vast majority of commenters in this proceeding, including Verizon Wireless, believe that the Commission should adopt notice and opt-out procedures for use and disclosure of CPNI, or at least give carriers the flexibility to employ this approach.[2] These commenters point out that notice and opt-out is a narrowly tailored policy that will provide consumers with full privacy protection, while enabling carriers to more quickly and effectively market new and innovative telecommunications services.

A return to opt-in is favored by just two commenters, a coalition of privacy advocates (the "Opt-in Coalition") and Mpower Communications.[3] Their comments focus on the supposed inadequacy of the notice and opt-out approach, and the importance of the goals furthered by restricting the use and disclosure of CPNI. Their arguments are without merit and do not justify

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[2] *See, e.g.,* Comments of ALLTEL Communications, Inc. (Nov. 1, 2001); Comments of AT&T Wireless Services, Inc. (Nov. 1, 2001); Comments of BellSouth (Nov. 1, 2001); Comments of Cingular Wireless LLC (Nov. 1, 2001); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) (Nov. 1, 2001); Comments of SBC Communications Inc. (Nov. 1, 2001); Comments of the United States Telecom Association (Nov. 1, 2001); Comments of WorldCom Inc. (Nov. 1, 2001)

[3] Comments of the Electronic Privacy Information Center, American Civil Liberties Union, American Library Association, Center for Digital Democracy, Center for Media Education, Computer Professionals for Social Responsibility, Consumer Action, Consumer Federation of America, Junkbusters, Media Access Project, National Consumers League, Netaction, Privacy Activism, Privacy Journal, Privacy Rights Clearinghouse, Privacy Times, Public Citizen Litigation Group, and US PIRG (Nov. 1, 2001); Comments of Mpower Communications Corp. (Nov. 1, 2001).

the re-adoption of the constitutionally-invalidated opt-in mechanism.[4]

### A. OPT-IN PROPONENTS DO NOT SHOW THAT NOTICE AND OPT-OUT PROVIDES ANYTHING LESS THAN FULL PRIVACY PROTECTION

The Opt-in Coalition and Mpower argue that under a notice and opt-out approach, consumers opting out do not knowingly consent to carriers' use or disclosure of their CPNI. The Opt-in Coalition claims that carrier notices under opt-out will inevitably be "vague, incoherent, and often concealed in a pile of less important notices mailed from the same source" and that the opt-out approach "is not calculated to reasonably inform consumers about their privacy options."[5] As a result, these commenters assert, notice and opt-out is not an effective method of protecting customer privacy.[6]

These claims are meritless and undocumented. When customers receive notice regarding their CPNI rights and have a convenient means of opting out, a decision not to exercise that opt-out right constitutes a meaningful approval of a carrier's use and disclosure of CPNI.[7] The sufficiency of opt-out as a mechanism that protects privacy is not just the view of most parties in

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[4] In 1999, Congress enacted Section 222(f) to govern the use of wireless location information. 47 U.S.C. § 222(f). In response to a petition earlier this year from CTIA, the Commission is currently addressing the treatment of wireless location information in a separate proceeding. *See* CTIA Petition for Rulemaking on Fair Location Information Practices, WT Docket No. 01-72 (Nov. 22, 2000). Verizon Wireless agrees with other commenters that separate consideration of wireless location information is the appropriate approach and urges the Commission to limit its analysis in this proceeding to other forms of CPNI. *See* Comments of Alltel at 6; Comments of Cingular at 8-9; Comments of Sprint Corporation at 7.

[5] Comments of Opt-in Coalition at 5.

[6] Comments of Opt-in Coalition at 5; Comments of Mpower at 5.

this docket – it is the stated view of Congress[8] and the FCC itself in other proceedings.[9] With the addition of a thirty-day opt-out period following notice, the Commission's existing notice rules will sufficient to ensure such knowing, informed approval.[10] Verizon Wireless is committed to protecting customer privacy, and will work to ensure that subscribers receive notice of their right to control use of their CPNI.

In their comments, the Opt-in Coalition and Mpower present no evidence that is relevant

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[7] Notice can be provided to consumers in a variety of ways, including through oral, written, or electronic means, through Web-based applications, through user signaling on the wireless device, and through a "break the seal" process for initiating service. In addition, as suggested by the Commission, customers should be able to opt out through such means as the "detachable reply card, toll-free telephone number or electronic mail address." *FNPRM* ¶ 9.

[8] Congress decided just two years ago in the Gramm-Leach-Bliley Act that a notice and opt-out framework is the appropriate approach to regulating financial institutions' use of consumers' financial information. *See* Gramm-Leach-Bliley Act, Title V, Pub. L. No. 106-102, 113 Stat. 1338, Section 502 (1999); 15 U.S.C. § 6802; Comments of Verizon Wireless at 10 (Nov. 1, 2001). In doing so, Congress explicitly rejected the use of an opt-in mechanism. H.R. Rep. No. 106-74, Section 501 (1999).

[9] The Commission has previously adopted an opt-out approach with respect to CPNI, doing so in the 1980's for the marketing of CPE and enhanced services by AT&T, the BOCs, and GTE, and again in 1995 when it approved AT&T's acquisition of McCaw's cellular operations. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Phase I Report and Order*, 104 FCC 2d 958, ¶¶ 264-65 (1986); Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier I Local Exchange Company Safeguards, *Report and Order,* 6 FCC Rcd 7571, ¶¶ 84-89 (1991); In re Applications of McCaw and AT&T Co., *Memorandum Opinion and Order on Reconsideration,* 10 FCC Rcd 11786, 11794 (1995); Comments of Verizon Wireless at 9. The Commission has also applied the opt-out approach in other telecommunications contexts, including in proceedings relating to telemarketing and the treatment of information pertaining to unlisted subscribers. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order,* 7 FCC Rcd 8752, 8770 (1992); Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Petitions for Waiver of Rules Adopted in the BNA Order, *Second Order on Reconsideration*, 8 FCC Rcd 8798, 8810 (1993).

[10] *FNPRM* ¶ 9.

to telecommunications carriers' CPNI practices. The Opt-in Coalition cites two privacy reports addressing general notice and opt-out issues, but it identifies no direct connection between these reports and the treatment of telecommunications-related of CPNI.[11] The Opt-in Coalition also cites a press report regarding alleged deficiencies in customer notices pertaining to the use of financial information,[12] but it does not explain why these supposed problems will also occur in the telecommunications CPNI context. In fact, this article highlights the fact that with the Gramm-Leach-Bliley Act, Congress decided on a notice and opt-out regime for personal financial data.[13] This information is if anything more sensitive than CPNI, yet Congress decided that opt-out is sufficient to safeguard privacy. There is no justification for imposing the more burdensome opt-in restriction on carriers in this proceeding.

### B. OPT-IN PROPONENTS FAIL TO DEMONSTRATE THAT OPT-IN CAN SURVIVE CONSTITUTIONAL SCRUTINY

The Opt-in Coalition and Mpower also fail to confront the insurmountable constitutional obstacles to a return to the opt-in approach. Rather than attempt the full First Amendment analysis now required by *US WEST v. FCC*,[14] these commenters merely stress the importance of

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[11] Comments of Opt-in Coalition at 5 nn. 23, 24 (citing Paul M. Schwartz & Joel R. Reidenberg, Data Privacy Law: A Study of United States Data Protection 329-30 (1996); Privacy Rights Clearinghouse Second Annual Report 21 (1995).

[12] Comments of Opt-in Coalition at 6 n. 25 (citing Robert O'Harrow Jr., "Getting a Handle on Privacy's Fine Print: Financial Firms' Policy Notices Aren't Always 'Clear and Conspicuous,' as Law Requires," Washington Post, June 17, 2001, at H1.

[13] Gramm-Leach-Bliley Act, Title V, Pub. L. No. 106-102, 113 Stat. 1338, Section 502 (1999); 15 U.S.C. § 6802.

[14] *U.S. WEST, Inc., v. FCC*, 182 F.3d 1224 (10th Cir., 1999), *cert. denied*, 120 S. Ct. 2215 (Jun. 5, 2000) (*"U.S. WEST v. FCC"*).

the policy interests supposedly furthered by Section 222(c) and the Commission's CPNI regulations. The Opt-in Coalition refers to citizens' "legitimate and significant expectation of privacy with respect to sensitive personal information such as which telephone numbers they have dialed,"[15] while Mpower focuses both on privacy and on Section 222's supposed goal of furthering competition in telecommunications.[16] But neither commenter makes any effort to satisfy the crucial third prong of the Supreme Court's *Central Hudson* test for restrictions on commercial speech, the requirement that such restrictions be narrowly tailored.[17] These commenters fail to demonstrate with clear, convincing, and concrete evidence that opt-in does not suppress more carrier use of CPNI than necessary to protect customers' privacy. They have thus failed to make the constitutionally-required showing. On this record, the Commission cannot return to that approach. Given the continuing availability of notice and opt-out, the Commission simply cannot satisfy this heavy but well-settled legal burden that is designed to protect First Amendment interests.[18]

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[15] Comments of Opt-in Coalition at 3.

[16] Comments of Mpower at 7-8. Mpower ignores the Tenth Circuit's finding in *US WEST v. FCC* that the Commission had failed to demonstrate that the promotion of competition was one of Congress' objectives in passing Section 222. On that basis, the Court minimized any consideration of competition in its First Amendment analysis. *U.S. WEST. v. FCC*, 182 F.3d at 1236-37.

[17] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980).

[18] In its comments, Mpower proposes that "sensitive" CPNI relating to "Customer Usage Information" should be subject to opt-in, while opt-out is sufficient in the context of less problematic "Customer Facilities Information." Comments of Mpower at 1-2. The First Amendment analysis in *US WEST v. FCC*, however, is applicable to restrictions on the use of any type of CPNI (except for the wireless location information targeted by Section 222(f)), and Mpower's bifurcation proposal is therefore irrelevant from a constitutional perspective. Nor is there any statutory basis in Section 222 for establishing such CPNI categories.

## II. IF NECESSARY, THE COMMISSION SHOULD RECONFIRM THE CPNI RULES AND POLICIES ESTABLISHED IN CPNI RECON ORDER

In the *FNPRM*, the Commission tentatively concluded that *US WEST v. FCC* invalidated only the challenged opt-in restriction, and not the entire regulatory framework for CPNI.[19] The Commission asked for comment on this conclusion.[20] In response, some commenters argue that the effect of *US WEST v. FCC* was to vacate all of the Commission's CPNI rules, not only the opt-in element in Section 64.2007(c).[21]

While Verizon Wireless continues to oppose opt-in, it supports the other elements of the existing CPNI framework, including the Total Service Approach and rules permitting CMRS providers to use CPNI to market wireless handsets and a variety of services formerly characterized as "adjunct-to-basic."[22] If the Commission determines that it must take further action to maintain these other aspects of its CPNI policy, it should re-adopt the rules and policies contained in its 1999 CPNI *Recon Order* in the instant rulemaking proceeding.[23]

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19 *FNPRM* at para. 13.

20 *Id.*

21 *See, e.g.*, Alltel Comments at 3; CTIA Comments at 2.

22 *See* 47 C.F.R. §§ 64.2005(b)(1), (c)(3).

23 Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, *Order on Reconsideration and Petitions for Forbearance,* CC Docket Nos. 96-115 and 96-149, 14 FCC Rcd 14409 (1999) ("*Recon Order*").

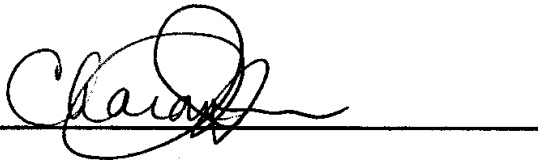
## CONCLUSION

For the aforementioned reasons, Verizon Wireless urges the Commission to reject the arguments in favor of an opt-in requirement and instead adopt the notice and opt-out approach for carriers' use of CPNI outside the Total Service Approach.

Respectfully submitted,

VERIZON WIRELESS

John T. Scott, III
Vice President and Deputy General
Counsel - Regulatory Law
1300 I St, N.W., Suite 400 West
Washington, D.C. 20005
(202) 589-3760

By: 

Charon J. Harris
Stephen J. Berman
1300 I Street, N.W., Suite 400 West
Washington, DC 20036
(202) 589-3740

Its Attorneys

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